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81-455
No.

IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH, et al.,
Cross-Appellants

v.

UNITED STATES OF AMERICA, et al.,
Cross-Appellees

On Appeal From the United States District Court for the Central District of California

CROSS-JURISDICTIONAL STATEMENT

WILLIAM BENTLEY BALL
PHILIP J. MURREN
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

ERIC NELSON LINDQUIST
ROBERT L. TOMS
LISA A. RUNQUIST
CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
(213) 628-1300

Attorneys for Cross-Appellants

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

Does imposition of the Federal Unemployment Tax Act on pervasively religious schools violate rights, guaranteed by the Religion Clauses of the First Amendment, of those schools, of churches of whose mission religious schools are a part, of teachers pursuing a religious vocation in such schools and of parents whose children are enrolled therein?

The parties in the court below were:

PLAINTIFFS

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheeley;

Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of La Mesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

DEFENDANTS

The State of California;

The California Employment Development Department;

The Director of the California Employment Development Department;

The United States of America;

The United States Department of Labor; and

The United States Secretary of Labor.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CROSS-JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court filed September 21, 1979 (App. A)[1] is unreported. The first supplemental opinion, filed June 2, 1980 (App. C), and the second supplemental opinion (App. E), filed April 3, 1981 (App. F) are likewise unreported.

1. The Appendices to the Jurisdictional Statement filed by the appellants United States of America, *et al.* are hereby incorporated by reference, and all citations to the appendices will refer to the pagination therein.

JURISDICTION

The judgment of the district court was entered on April 6, 1981 (App. F). Cross-appellees (the federal parties) filed notice of appeal to this Court on April 29, 1981 (App. G). On June 19, 1981, Justice Rehnquist extended the time in which to docket the appeal to and including August 3, 1981 (App. H). The cross-appellants take this cross-appeal under the second paragraph of 28 U. S. C. § 1252, having received notice of appeal by cross-appellees that the latter had invoked the jurisdiction of this Court herein under that section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendent 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

26 U. S. C. 3309(b):

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980):

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT OF THE CASE

On January 8, 1979, Grace Brethren Church, along with other churches and their pastors, two groups of religious schools, parents of children attending these, and teachers in the schools, brought this action in the district court against the United States and the State of California. The complaint challenged the imposition, upon the schools of the plaintiff churches and the other plaintiff religious schools, of the Federal Unemployment Tax Act ("FUTA"), 26 U. S. C. § 3301 *et seq.*, and the corresponding California Unemployment Insurance Code. Count II of the complaint recited that the imposing of these tax acts upon the religious ministries in question violated the Free Exercise Clause. The district court, on April 6, 1981, enjoining the imposition of the acts on statutory and other constitutional grounds,[2] held that no violation of the Free Exercise Clause arises from such imposition (App. F). The United States filed notice of appeal to this Court on April 29, 1981 (App. G), and on June 19, 1981, Justice Rehnquist extended, until August 3, 1981, the time in which to docket the appeal. The appeal by the United States is pursuant to 28 U. S. C. § 1252. The churches, religious schools, parents and teachers now cross-appeal pursuant to the second paragraph of the same jurisdictional statute.

---

2. The district court held that the imposition of the unemployment tax program on the church-schools (whether incorporated separately from a church or not) (a) is barred by the plain meaning of § 3309(b)(1) of the federal act which exempts church employees, and (b) creates excessive church-state entanglements forbidden by the Establishment Clause. The court also held that application of the act to the non-church religious schools would be "incompatible with the Religion Clauses of the First Amendment . . . because they result in excessive entanglement of the state with religion . . ." (App. F at 88a).

THE QUESTION PRESENTED IS SUBSTANTIAL

This cross-appeal presents issues to the Court of major significance to churches and religious ministries throughout the nation. The judgment of the district court, holding that religious liberty is not violated by the taxing of a religious ministry, contradicts principles long established by the Supreme Court.

The cross-appellees' complaint set forth seven ways in which Free Exercise rights would here be violated through imposition of the Unemployment Tax Act.[3] The district court specifically dealt with but one of these—namely, the taxing of a ministry. The threefold basis for the district court's conclusion that no Free Exercise violation results from such taxation is: (a) the tax is "indi-

3. (a) It imposes a tax and other financial burdens upon purely religious activity; (b) it imposes burdens of accounting and reporting upon religious ministries; (c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry; (d) it burdens and endangers the ability of parents to choose a religious education for their children; (e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people; (f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education; (g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was termination of employment for "just cause". Termination of employment from a church entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the churches may be required to pay unemployment compensation where dismissal was based upon religious grounds

rect"—*i.e.*, it is not directly on a religious activity, (b) the tax is an "insufficient burden" on religious freedom to justify holding it unconstitutional, (c) a compelling state interest justifies imposing the tax. To the contrary, it is clear that:

1. The tax affects religious activity. If the tax in question does not directly weigh upon religious activity, then no constitutional issue is posed by it. The court below stated two reasons that the tax should not be held to directly affect religious activity: It "is collected from religious institutions, not from individual religious believers". (App. E at 62a); second, the tax "is imposed upon the employment relationship and not upon individual religious acts". *Ibid.* Neither point is correct, though each is of high constitutional significance in the premises. Obviously, the fact that a tax is collected from religious institutions, and not from individual religious believers, does not relieve the tax of any possible unconstitutional feature; indeed, a tax on some religious institutions may be tantamount to a tax on individual religious believers, or on religious activity itself. The court was plainly incorrect in the conclusion at which it arrived in the following key statement:

> "It is true that individual teachers and administrators may view their work as a religious calling and that the primary purpose of religious schools is to inculcate religious doctrine. It is also true that administrators of religious schools may hire or terminate employees on religious grounds. However, none of the foregoing facts transforms the hiring or firing of a teacher, or the payment of his salary, from a secular to a religious act analogous to preaching. To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of re-

ligion or to those who engage in it is constitutionally immunized from taxation." (App. E at 12a).

The trial record, however, discloses that the employment relationship, in the schools here involved, is *completely* religious, and that no valid separation can be made between (a) the pervasively religious entity which is the school, (b) the teacher pursuing a religious vocation within that entity, and (c) those bonds of discipline, communication, interaction and common discipleship between the two which constitute the employment relationship (T. 31-33).[4] Teachers in the Christian schools are hired for religious reasons; in most cases firing would also be for such reasons, whether related directly to doctrine, to morality, to level of fervor or to classroom proficiency—even the last-mentioned being considered part of the duty of faithful witness (T. 34-35). The views of the district court on this point are a throwback to assumptions advanced by Pennsylvania and Rhode Island in the *Lemon-DiCenso* litigations[5]—namely, that the religious schools there considered could be viewed as being composed of various "religious" and (discrete) "secular" components. This view the Supreme Court rejected seeing, instead, that such schools are unitary organisms, pervasively religious and incapable of a religious-secular bifurcation. *Lemon v. Kurtzman, supra,* at 657; *Meek v. Pittenger,* 421 U. S. 349, 366 (1975).

The district court, thus viewing the employment relationship in the Christian school as only "remotely connected to the exercise of religion", states that the Su-

4. References are to the transcript of proceedings before the Hon. Mariana R. Pfaelzer on August 12-13, 1980.

5. See *Lemon v. Kurtzman,* 403 U. S. 602 (1971).

preme Court, in its *Murdock*[6] and *Follett*[7] decisions did not intend that such activity would be "constitutionally immunized from taxation" (App. E at 62a). Those decisions the court misapplies. They stand as bedrock decisions against the taxation of religious activity. Thus they support the position of the religious parties before the Court whose activity, in the form of the employment relationship, is the religious keystone of their enterprises. There can be no doubt that, whether unconstitutionally or not, the unemployment compensation tax burdens an activity which is undeniably religious.

2. *The tax unconstitutionally burdens religious free exercise.* The district court states: "In short, the injury to Free Exercise rights asserted by plaintiffs ultimately comes down to the financial burden imposed by the extension of the unemployment compensation tax to these schools" (App. E at 60a-61a). The court held the imposing of the tax to be constitutionally inoffensive because, so the court believed, the tax burden was not "significantly" heavy. Here the court mistakenly relied, for its legal conclusion, upon dictum of the Supreme Court in *Braunfeld v. Brown*, 366 U. S. 599 (1961) and, for its factual conclusion, upon "the record as a whole". In both of its conclusions the court erred.

The dictum from *Braunfeld* in no sense sustains a principle that government may tax religious activities or enterprises if the only effect of the tax is to render these (in the words of the district court) "somewhat more expensive". Obviously, to render any activity "more expensive" may retard that activity. *Braunfeld* involved a state's Sunday closing law challenged by Orthodox Jewish mer-

6. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

7. *Follett v. McCormick*, 321 U. S. 573 (1944).

chants under the Free Exercise Clause. The law barred them from selling on Sunday, while their religion barred them from selling on Saturday. The combined effect was potentially to reduce their personal incomes. No tax was involved, and no imposition directly upon a religious activity, practice or relationship. The closing law did not bar, refer to, or in any way deal with the Orthodox Jewish Sabbath or services. Nor did it deal with religious observance on Sundays. It simply regulated secular activity on the latter days. Hence the Court was able to characterize the law's effect on the Orthodox Jewish merchants as "indirect". *Id.* at 607.[8] This is radically different from the situation at bar where not only is a tax involved but that tax is imposed directly on a critically important aspect of the religious enterprise.

The district court's employment of the *Braunfeld* dictum in the premises calls for this Court's correction because the principle is erroneous and dangerous, that the dollar-amount *smallness* of a tax on religion absolves that tax from unconstitutionality. Certainly in Establishment Clause cases the Supreme Court has most carefully stressed that the dollar-amount smallness of an exaction of public funds for religious purposes does not relieve the exaction of unconstitutionality. *Committee For Public Education v. Nyquist,* 413 U. S. 756, 787 (1973). And see Justice Black's famous discussion in *Everson v. Board of Education,* 330 U. S. 1, 16 (1947), that the Establishment Clause means, at least, that "No tax, *in any amount, large or small,*" for religious purposes may be valid. (Emphasis supplied). Madison's remark, in his *Memorial*

8. But see concurring opinion of Justice Stewart in *Sherbert v. Verner,* 374 U. S. 368, 418 (1963) in which he concluded that *Braunfeld* cannot stand consistently with *Sherbert* and argued that "the *Braunfeld* case was wrongly decided and should be overruled."

and Remonstrance about "three pence" [9] has been cited with approbation by this Court. See *Flast v. Cohen*, 392 U. S. 83, 103 (1968). The same reasoning would appear essential in free exercise situations where government claims it may tax religion provided that the tax is merely small ("incidental"). If religion can be taxed a little, why not greatly? And if religion can be taxed a little with one tax, why not a little again with another tax—and still again other "small" taxes? [10]

The trial record herein does indeed show uncontradicted testimony of religious plaintiffs below that the unemployment tax would have heavy impact upon them (T. 44-46). The schools in question refuse, upon Scriptural grounds, to accept *any* local, state or federal programs of aid. They exist solely upon the voluntary contributions of their faith communities (T. 44-45). Although teachers are paid minimum wages, much of the instruction is also supplemented by aides who volunteer their time (T. 44). It is obvious that, in a day of grow-

9. ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON, 183, 186 (Hunt ed. 1901).

10. The district court attempts to minimize the impact of the unemployment tax by stating that a nonprofit employer is free to elect the reimbursement method of contribution (App. E at 63a). That, and the fact that the tax is thus different from the taxes seen in *Murdock* and *Follett*, the court offers as additional reasons for holding the unemployment tax inoffensive. But regardless of the "reimbursement" option, both the tax and the entire program would be imposed. And the fact that this tax differs from the taxes examined in *Murdock* and *Follett* is irrelevant. The Supreme Court has never indulged the apparent presumption of the district court—namely, to hold that the taxes invalidated in those cases exhausted the list of all possible unconstitutional taxes.

ing personal taxation and inflation, *no* tax burden upon the enterprise may be dismissed as "incidental" or "small."

Further, the tax is exacted as a necessary condition to the pursuit of the religious employment relationship, because failure to pay the tax, and failure to undertake and pay for the administration of the tax program within the religious institution, results in the imposition of damaging, and ultimately crippling, penalties upon the institution. See, for example, California Unemployment Insurance Code Sections 1126 (10% penalty), 1129 (interest), 1135 (delinquent assessments), 1137 (jeopardy assessment), 1755 (levy), 1785 (warrant for enforcement of liens), and 1787 (expenses of levying and execution of warrant). The Court should also note that in addition to penalties against the institution, the persons in control of the institutions' funds who refuse to pay the amounts "due" are personally liable for such amounts (Section 1757), and are subject to criminal penalties for nonpayment (Section 2108—nonpayment, a misdemeanor). Of course, even failing to submit "required" reports can result in a criminal conviction (Sections 2106, 2109 and 2112).

Further, the challenged program would extract from a religious body its religiously entrusted funds, which are devoted entirely to religious purposes, and require their transfer to governmentally determined secular uses. See *Walz v. Tax Commission,* 397 U. S. 664, 675 (1970), and note Mr. Justice Brennan's concurrence at 692.

3. *Imposition of the tax is not justified by a compelling state interest.* The district court, on the question of compelling state interest, holds that the tax scheme "meets the *Braunfeld* criteria for validity under the Free Exercise Clause" (App. E at 64a). While, as noted *supra,*

it is quite possible that *Braunfeld* may now be read as inconsistent with the test set forth in *Sherbert*, it is in any event clear that no state interest is here present which would justify the subordination of the free exercise claims advanced. The district court, devoting but a half page (App. E at 65a) to discussion of compelling state interest, points to nothing in the record to substantiate its broad claim that the imposition of the tax program on the religious ministries in question is necessitated if the adverse effects of unemployment nationally are to be diminished through the operation of FUTA.

In *Sherbert* the State countered the religious claimant's demand for unemployment compensation benefits with an assertion, comparable to that of the district court here, that the integrity of the unemployment compensation program would be harmed were the religious claim to be recognized, and that, therefore, a compelling state interest justified denial of the claim. *Sherbert, supra,* at 407. Neither there, nor here, does "the record appear to sustain [the government's contention]." *Ibid.* The Court in *Sherbert* compared that case with the facts of *Braunfeld*, noting that, in the latter, the requiring of exemptions for Sabbatarians would have presented "an administrative program of such magnitude, and afforded the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable". *Id.* at 408-409. No comparable factors appear in the present case.

The Court in *Sherbert*, also held it incumbent upon the State "to demonstrate that no alternative forms of regulation would combat such abuses [the alleged threats to the integrity of the unemployment compensation program] without infringing First Amendment rights". *Id.* at 407. In the present case neither the Government nor the district court has offered such demonstration. Plainly

none could be offered. Just as in *Murdock, supra,* it is clear that the governmental interests which the tax is designed to support will be realized without imposing the tax on the religious activity in question.[11]

The district court's opinion omits any discussion of other specific claims which the religious parties have made under the Religion Clauses in their complaint. Each of these claims was supported by substantial evidence. For example:

Governmental conditioning of employment relationships, within religious institutions. The testimony of Government witnesses showed that it is a national practice under the Act to plunge boldly into religious issues (T. 175-184, 197-221, 261-274). This necessarily chills the exercise of religious liberty within the religious body, it being known that the propriety of every discharge is subject to review by government (though if the governmental body would decline to consider religious reasons for the discharge, an equally oppressive burden would be placed upon the institution's liberty to govern its ministry).

Imposition upon the right to pursue a religious vocation. The Supreme Court has noted that "the church-teacher relationship in a church-operated school differs from the relationship in a public or other non-religious school". *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 504 (1979). The teachers in the present case are unquestionably pursuing a ministry, apostolate, or religious vocation. *McDaniel v. Paty,* 435 U. S. 618, 626

11. ". . . the notion at the core of *Murdock* was plainly that the state's legitimate needs for regulation and revenue could be met reasonably well without imposing potentially crushing burdens on religious activity." L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 849.

(1978). Testimony was presented that their settled belief in the providence of God causes them to reject a substituted governmental providence (T. 109-111).

Injury to religious rights of parents. The trial record shows that the free exercise rights of parents are threatened by the imposition of the program. Parent plaintiffs testified that they are a prime source of the schools' funding and that the unemployment tax imposes on their schools an additional cost for a program unrelated to Christian education. They also believe that the program would lead to the presence of religiously undesirable teachers in the school (T. 115).

Excessive entanglements. This Court has frequently spoken a condemnation of "excessive entanglements" between church and state.

In *Walz v. Tax Commission,* 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court warned against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon, supra,* the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs,, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

The Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson,* 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and *no govern-*

> *ment analysis* of an institution's expenditures *on secular as distinguished from religious activities.*" *Id.* at 688. (Emphasis supplied.)[12]

The Court, in *Walz*, indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra*, at 674) constitute, without more, entanglements between government and religion.

At the outset of the administrative relationship, embodied in unemployment tax coverage, the State must audit the financial records of the church or school.

The church or school is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The church will also have to post government notices on its premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.

Many other administrative commands must be obeyed, and limitless inspections and evaluations of religious matters permitted, most under criminal penalty for non-compliance.[13]

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement"

12. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets*, 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

13. See, for example, California Unemployment Insurance Code §§ 1085, 1086, 1088, 1089, 1092, 1126, 1128, 1703, 1735, 1815, 1953, 2105, 2108, 2109.

and impermissible by virtue of the Establishment Clause of the First Amendment.

Inhibition of religion. A statutory scheme offends the Establishment Clause of the First Amendment if, *inter alia*, it has a "principal or primary effect" which "advances" *or* "inhibits" religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773 (1973). In *Nyquist*, the Court invalidated a New York program that provided State Funds for "maintenance and repair" of nonpublic schools, including religious schools. In the Court's view, the program had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." *Id.* at 774.

If, as in *Nyquist*, direct subsidy to religious schools "advances" religion, it necessarily follows that direct extraction of funds—funds earmarked for religious purposes—in the form of unemployment taxation, has a primary effect which "inhibits" religion and, under *Nyquist* and cases cited therein, cannot withstand constitutional challenge brought under the Establishment Clause.

CONCLUSION

For all of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM BENTLEY BALL
PHILIP J. MURREN
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

ERIC NELSON LINDQUIST
ROBERT L. TOMS
LISA A. RUNQUIST
CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
(213) 628-1300

Attorneys for Cross-Appellants

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MOTION TO DISMISS OR AFFIRM OF CROSS-APPELLEES STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THE DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT.

GEORGE DEUKMEJIAN,
Attorney General,
EDMOND B. MAMER,
JEFFREY M. VESELY,
Deputy Attorneys General,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2555,

Attorneys for Cross-Appellees, State of California, California Employment Development Department, and The Director of California Employment Development Department.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Counterstatement of Questions Presented.

1. Where the cross-appellants disagree with portions of the District Court's opinion below, is a cross-appeal properly taken from the judgment therein which afforded all of the relief the cross-appellants sought?

2. Whether a violation of the Free Exercise Clause results from the inclusion of employees of religious schools in the unemployment compensation program.

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No. 81-455

IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH, *et al.*,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Cross-Appellees.

MOTION TO DISMISS OR AFFIRM OF CROSS-APPELLEES STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THE DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT.

Cross-appellees State of California, California Employment Development Department and The Director of the California Employment Development Department (hereinafter collectively referred to as "the State") respectfully move to dismiss the cross-appeal herein, or in the alternative, affirm the judgment of the District Court insofar as that judgment is challenged by this cross-appeal.

Constitutional Provisions and Statutes Involved.

The constitutional and statutory provisions involved are correctly set forth in the Cross-Jurisdictional Statement.

Counterstatement of the Case.

Cross-appellants initiated this action challenging and seeking to enjoin the imposition, upon the schools operated by the cross-appellants, of unemployment taxes under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301, *et seq.* and the corresponding state law, California Unemployment Insurance Code. Cross-appellants contended that services performed at their schools were not subject to unemployment taxation on purely statutory grounds. In the alternative, cross-appellants argued that to impose unemployment insurance coverage upon them would be violative of their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The District Court granted all of the relief sought by the cross-appellants, enjoining the collection of unemployment information and tax from all of the churches and schools which are cross-appellants herein. (*See*, Appendix F at 87a-90a.)[1]

Specifically, the District Court found as to some of the schools operated by the cross-appellants that they were exempted from the unemployment compensation tax program by the plain meaning of the statutes in issue herein. (Appendix F at 88a-89a.) As to the remainder of the schools operated by the cross-appellants, the District Court concluded that said schools were not exempted by virtue of the plain meaning of the statutes, but nevertheless held that to apply the statutes to them would result in entanglement between Church and state forbidden by the First Amendment to the United States Constitution. (Appendix F at 87a-89a.)

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[1]The reference herein to Appendices is to The Appendices to the Jurisdictional Statement filed by appellants United States of America, *et al.* in Case No. 81-228 and the pagination thereof.

The Order and Judgment of the District Court makes no reference to the absence of a violation of the Free Exercise Clause by the imposition of the unemployment tax. (Appendix F.) Rather, the District Court's Second Supplemental Opinion includes a discussion of the issue and a rejection of the arguments put forth herein by the cross-appellants. (Appendix E at 56a-66a.) It is this portion of the opinion from which the instant cross-appeal is actually taken.

ARGUMENT.

I.

Cross-Appellants Are Not Aggrieved by the Judgment Below and Therefore May Not Appeal From It.

There are two standing requirements a party must satisfy in order to be entitled to appeal from an order or judgment. First, the appellant must be privy to the record. Second, the appellant must be aggrieved by the order or judgment appealed therefrom. 9 Moore's FEDERAL PRACTICE, ¶ 203.06 (2d ed. 1980). It is the second requirement which is absent herein.

A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 333; *United States Parole Comm'n. v. Geraghty* (1980) 445 U.S. 388, 402; *Perez v. Ledesma* (1971) 401 U.S. 82, 87 n. 3; *Public Service Comm'n. v. Brashear Freight Lines, Inc.* (1939) 306 U.S. 204, 206; *Lindheimer v. Illinois Telephone Co.* (1934) 292 U.S. 151, 176; *New York Telephone Co. v. Maltbie* (1934) 291 U.S. 645; *Corning v. Troy Iron & Nail Factory* (1854) 15 How. 451, 464. Moreover, a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. *Lindheimer v. Illinois Telephone Co., supra,* 292 U.S. 151, 176; *Electrical Fittings Corp. v. Thomas & Betts Co.* (1939) 307 U.S. 241, 242. Appeals are to be taken from portions of a court's *order* which a litigant seeks to change, *not* from parts of an *opinion* with which the litigant disagrees. *See,* Robert L. Stern, *When To Cross-Appeal Or Cross-Petition — Certainty Or Confusion?* (1974) 87 Harv.L.Rev. 763, 774.

In the present case, there is nothing in the judgment below relating to Free Exercise Clause violations which aggrieves the cross-appellants. The cross-appellants obtained the precise injunctive relief they sought. Nothing more was requested nor could be obtained. That which the cross-appellants seek to change is *not* portions of the District Court's judgment, but rather parts of the opinion. As the above authorities indicate, such is not proper grounds for an appeal. Therefore, the cross-appeal must be dismissed.

II.

No Violation of the Free Exercise Clause Results From the Inclusion of Employees of Religious Schools in the Unemployment Compensation Tax Program.

Cross-appellants contend that the District Court erred in finding that the inclusion of employees of religious schools in the unemployment compensation tax program results in no violation of the Free Exercise Clause. The State respectfully disagrees with the cross-appellants. The law and the facts of this case plainly support the District Court's findings. None of the arguments put forth herein by the cross-appellants are new. They were fully considered and properly rejected by the District Court in a well reasoned opinion. (Appendix E at 56a-66a.)

In considering cross-appellants' arguments below, the District Court correctly observed that the injury to the Free Exercise rights asserted by the cross-appellants ultimately comes down to the *financial* burden imposed by the extension of the unemployment compensation tax to these schools. (*See*, Appendix E at 60a-61a, 65a-66a.) Indeed, cross-appellants' chief witness, the superintendent of Redwood Christian Schools (one of the cross-appellants), testified below that a very important reason his school is op-

posed to the imposition of the unemployment compensation tax is the *financial* aspect of the program. (R.T., pp. 43-45.)[2] Consistent therewith, the superintendent also testified that with respect to minimum wage and worker's compensation laws his school would *not* comply with those laws if the *cost of compliance* rose to a point *above* that which would be acceptable to the school. (R.T., pp. 40-42; 70-73.) Further, the testimony of another cross-appellant, a parent of students attending Redwood Christian Schools, indicated that her opposition to the imposition of the unemployment compensation tax was *financially* related in that her tuition would have to increase in the event the program was extended to cover Redwood. (R.T., p. 115.)

In all, the evidence presented below plainly demonstrated that the burden or injury complained of by the cross-appellants was purely financial in nature.[3] As the District Court correctly noted "there [was] no suggestion that the extension of the tax to religious schools would abridge rights to the free exercise of religion in any fashion *independent* of the financial burden which accompanies any tax." (Appendix E at p. 60a.) This Court has noted previously that the mere fact that a statute renders the practice of religion

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[2]"R.T." refers to Reporter's Transcript of proceedings before Hon. Mariana R. Pfaelzer on August 12-13, 1980.

[3]The District Court correctly pointed out (Appendix E at 62a-63a) that the "burden" the unemployment compensation's tax imposes upon a non-profit employer such as cross-appellants is *indirect* in that the employer may elect the "reimbursement method" of contribution and thus contribute only the amounts of benefits actually found due to its former employees who have been or are discharged. *See*, 26 U.S.C. §§ 3303(e), 3309(a)(2) and California Unemployment Insurance Code § 801, *et seq*. In the alternative, the employer may choose the "tax rate" method and contribute according to the number of employees and his past employment history. *See*, 26 U.S.C. § 3302(a)(1) and California Unemployment Insurance Code §§ 901, *et seq*. and 976, *et seq*. Clearly, the opportunity to select either method of contribution minimizes the financial impact upon the employer.

more expensive is not, by itself, sufficient to bring the statute into conflict with the Free Exercise Clause. *Braunfeld v. Brown* (1961) 366 U.S. 599, 605; *Johnson v. Robison* (1974) 415 U.S. 361, 383-385 (argument rejected that the withholding of educational benefits from a conscientious objector violated the free exercise rights of the objector). There is no constitutional right to exemption from taxes for the cross-appellants. *Follett v. McCormick* (1944) 321 U.S. 573, 578; *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112.

Moreover, it is without dispute that religiously based activities "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder* (1972) 406 U.S. 205, 220, *See, Gillette v. United States* (1971) 401 U.S. 437 (conscientious objector exemption statute upheld); *Braunfeld v. Brown, supra,* 366 U.S. 599 (mandatory Sunday closing law applicable to Orthodox Jewish merchants); *Prince v. Massachusetts* (1944) 321 U.S. 158 (child labor law applicable to religious organizations); *Reynolds v. United States* (1879) 98 U.S. 145 (polygamy statutes applicable to religious organizations which sanctioned such activities).

Neutral legislation which is far more burdensome upon the practice of religion than that which is present in the instant case has been upheld by this Court where important public policies are at stake. *Committee For Public Education And Religious Liberty v. Regan* (1980) 444 U.S. 646, 659-661; *Prince v. Massachusetts, supra,* 321 U.S. 158.

Furthermore, cross-appellants argue that excessive entanglement results from the routine duty under the unemployment compensation tax program to keep accurate em-

ployment records and make related reports to the State. This argument must be rejected in that the recordkeeping involved herein is far less extensive than that which was recently sustained against similar charges in *Committee For Public Education And Religious Liberty v. Regan, supra,* 444 U.S. 646, 659-661.

Finally, the District Court correctly pointed out that there is indeed a compelling secular governmental interest in providing unemployment compensation to unemployed individuals. (Appendix E at 64a-65a.) *See,* California Unemployment Insurance Code § 100, which lists the secular purposes for which California adopted its own unemployment compensation program. Further, this Court has recognized the extreme importance of unemployment benefits. *California Department of Human Resources v. Java* (1971) 402 U.S. 121, 131-2. ("Unemployment benefits provide cash to a newly unemployed worker, 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels . . ."). When this compelling interest is balanced against the indirect, purely financial burden which the unemployment compensation tax program imposes upon the cross-appellants, the conclusion is inescapable that no violation of the Free Exercise Clause results from the inclusion of the employees of religious schools in the unemployment compensation tax program.

Conclusion.

For the reasons stated herein, the cross-appeal should be dismissed or in the alternative the judgment insofar as it is being challenged by the cross-appeal should be affirmed.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General,
EDMOND B. MAMER,
JEFFREY M. VESELY,
Deputy Attorneys General,
Attorneys for Cross-Appellees, State of California, California Employment Development Department, and The Director of California Employment Development Department.

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OCTOBER TERM, 1981

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CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS

This cross-appeal was filed in connection with *United States* v. *Grace Brethren Church*, No. 81-228 (Cross-J.S. 2).[1]

1. Cross-appellants argue that the district court incorrectly rejected their claim that the Federal Unemployment Tax Act (FUTA), as applied to employees of religiously oriented schools not affiliated with any church, violates the Free Exercise Clause of the First Amendment. The district court instead relied on the Establishment Clause of the First Amendment in holding the statute unconstitutional as applied to those schools (81-228 J.S. App. 66a-76a). In so

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[1]The State of California, *et al.*, have also perfected an appeal from the same decision, No. 81-31, but the cross-appeal was filed substantially more than 30 days after the filing of the State's Jurisdictional Statement on July 8, 1981, and thus would not be a timely cross-appeal from that appeal. See Sup. Ct. R. 12.4.

doing, it simply rejected one of the alternative rationales on which cross-appellants based their claim that the statute could not constitutionally be applied to them. Cross-appellants do not seek to expand the relief awarded by the judgment below.

Rule 10.5 of the Rules of this Court provides that "an appellee, without filing a cross-appeal, [may] defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted." It was accordingly unnecessary for cross-appellants to file their cross-jurisdictional statement in order to preserve their contention that FUTA, as applied to non-affiliated but religiously oriented schools, violates the Free Exercise Clause of the First Amendment.

2. That contention is, in any event, without merit. In order to demonstrate that legislation is in conflict with the Free Exercise Clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). In the case at hand, the coverage of employees of religiously oriented non-church schools involves neither the taxing of the practice of religion nor any other "coercive effect."[2]

But FUTA and the complementary state law, the California Unemployment Insurance Code, are neutral, social welfare legislation. These laws form one part of the federal-state unemployment compensation system that protects working persons, their families and their communities

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[2]Cross-appellants incorrectly suggest that the tax imposes a burden on "religious institutions," "religious activities," "religion" or "religious ministries" (Cross-J.S. 6-12). The only question before the Court is whether the employees of schools that are not affiliated with any church are covered by the FUTA. It is conceded that the Act does not apply to the employees of church affiliated schools, much less to religious institutions themselves (81-228 J.S. 6 n.5).

against the ill effects of sudden unemployment. This unemployment compensation system has, at most, only an indirect and incidental effect on the exercise of religion. Accordingly, cross-appellants carry a heavy burden in challenging the application to them of FUTA and the corresponding provisions of the California Code. As this Court has characterized that burden:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961). Cross-appellants' position does not withstand such critical scrutiny in the present case.

First, as the court below noted, "the record as a whole does not support the conclusion that the effect of the additional financial burden will be significantly harmful" (81-228 J.S. App. 59a). As this Court has stated, the mere fact that for certain individuals or entities a statute "operates so as to make the practice of their religious beliefs more expensive" is not grounds for striking it down. *Braunfeld* v. *Brown, supra*, 366 U.S. at 605. Thus, cross-appellants' argument that the imposition of the FUTA tax unconstitutionally burdens their religious activities is without basis in either fact or law.[3]

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[3]Indeed, in the present context an equally plausible Free Exercise claim could be made if Congress had chosen to exclude the employees of schools such as cross-appellants, "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation" such as protection under the unemployment insurance program. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in Court's opinion).

The tax is, in any case, not a tax on a religious ministry or religious acts. Rather, the tax is on the employment relationship between California employers and their employees—including those employers who operate religiously oriented, non-church schools. Thus, cross-appellants can no more claim a First Amendment exemption from the unemployment tax than they could from the assessment of income or social security taxes based on such employment. As the court below properly decided:

> To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation. That no such view was intended by the United States Supreme Court in *Murdock* and *Follett, supra,* is demonstrated by *dicta,* in both cases, expressly approving the taxation of the income of ministers or of church property (*Murdock, supra,* 319 U.S. at 112; *Follett, supra,* 321 U.S. at 578).

81-228 J.S. App. 62a. Accord, *Parker* v. *Commissioner,* 365 F. 2d 792, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967); *Basic Unit Ministry of Alma Karl Schurig* v. *United States,* 511 F. Supp. 166, 168-169 (D.D.C. 1981).

Finally, even if there were any merit to cross-appellants' contention that FUTA has a coercive effect on the exercise of their religion, such an effect would be counter-balanced by the compelling governmental interests served by FUTA. The district court, recalling the tragic economic history that led to the enactment of FUTA, concluded:

> [A]nyone having the slightest familiarity with the history of the Great Depression can have no doubt that the interest which the various unemployment compensation statutes have been designed to serve is a compelling one.

81-228 J.S. App. 65a. Thus, assuming, *arguendo*, that FUTA has some coercive effect on the exercise of religion, it is still valid under the First Amendment because it is justified by "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' " *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

It is therefore respectfully submitted that the cross-appeal should be dismissed.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

OCTOBER 1981

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